No. 06-152

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In the Supreme Court of the United States

R & F PROPERTIES OF LAKE COUNTY INC.,
F/K/A LEESBURG FAMILY MEDICINE,
Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.* KARYN L. WALKER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

MICHAEL J. BITTMAN
GRAYROBINSON, P.A.
301 E. Pine Street
Suite 1400
Orlando, FL 32801
(407) 843-8880

MICHAEL L. WALDMAN
Counsel of Record
ALYSSA C. LAREAU
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP
1001 Pennsylvania Avenue, NW
Suite 800
Washington, D.C. 20004-2505
(202) 639-7000

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

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REPLY BRIEF FOR THE PETITIONER

Respondent's opposition brief argues that, even if False Claims Act ("FCA") allegations are based on an objectively reasonable interpretation of an ambiguous regulation, the intent of the defendant is controlling and therefore any factual dispute over a contractor's knowledge precludes dismissal of an FCA action prior to trial. According to respondent, the Eleventh Circuit found a routine factual dispute regarding petitioner's knowledge and this unremarkable sufficiency of the evidence determination does not warrant review by this Court. Yet, along with mischaracterizing the decision below, respondent misses the entire point of the question presented in this petition. Consistent with the decisions of a number of lower courts, the petition argues that no FCA liability can attach to a claim submitted by a contractor based on a reasonable interpretation of an ambiguous regulation. Where the claim submitted to the government is an objectively reasonable interpretation of an ambiguous regulation or contract, a contractor is entitled to dismissal as a matter of law and the factual dispute regarding knowledge posited by respondent here is irrelevant.

Despite respondent's protestations to the contrary, the lower courts are split and confused on this question of the proper treatment of FCA allegations based on ambiguous regulations or contracts. Moreover, respondent's opposition does not even address the direct conflict noted in the petition between the decision below (and similar cases) and numerous criminal FCA cases. Respondent also fails to explain how submitting a claim based on an objectively reasonable interpretation of an ambiguous regulation or contract can ever rise to the level of fraud subjecting a

contractor to the FCA's punitive penalties and treble damages. Also, respondent cannot convincingly deny the exceptional importance of the question presented by this petition for FCA jurisprudence and all government contractors.[1]

A. The Instant Case Squarely Presents The Question Posed In The Petition

Respondent contends that this case is somehow not appropriate for addressing the question presented in the petition. The decision of the Eleventh Circuit, however, directly contradicts respondent, making clear that the court of appeals reversed the district court's dismissal based on its disagreement with the district court's conclusion that the ambiguous nature of the regulation precluded FCA liability as a matter of law:

> [T]he district court erred by holding that any ambiguity in the earlier version of 42 CFR § 410.26 and the HCFA 1500 certification necessarily forecloses, *as a matter of law*, the falsity of claims submitted by LFM prior to January 1, 2002. We agree that the regulatory language in effect until January 1, 2002 was ambiguous. But we disagree as to the *legal significance* of that ambiguity.

Pet. App. 12a (emphasis added). The appeals court's subsequent discussion concerning the implications of the

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[1] The significant and deleterious real-world impact of FCA allegations based on reasonable interpretations of ambiguous regulations and contracts also is highlighted in the briefs submitted in support of the petition by *amici curiae* Pharmaceutical Research and Manufacturers of America and the Washington Legal Foundation.

regulation's ambiguity, including its reliance on *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Systems*, 276 F.3d 1032 (8th Cir. 2002), plainly goes directly to the question presented by this petition.

The instant case highlights the starkly different outcomes depending on how courts approach FCA allegations based on ambiguous regulations or contracts. If, as petitioner asserts, a claim based on an objectively reasonable interpretation of an ambiguous regulation or contract cannot rise to the level of fraud required for liability under the FCA, then these FCA lawsuits can be resolved in favor of defendants at an early stage. A court would be able to determine long before trial that the ambiguity relating to the claim submitted to the government makes the allegations inappropriate for proceeding under the FCA.[2]

By contrast, under respondent's theory, dismissal prior to trial would be impossible. Respondent would consider irrelevant the fact that the contractor's claim to the government was a reasonable interpretation of an ambiguous regulation or contract -- instead, the only issue for a court would be the knowledge of the defendant contractor. Yet, it is inherent in the very nature of *ambiguous* regulations or contracts that they might be interpreted contrary to a contractor's view -- a contractor will know that there is more than one reasonable interpretation, that the government has (or may adopt) a contrary view, and that the government's

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[2] The government could still seek to recover under breach of contract and other contractual and administrative theories if the contractor's interpretation is contrary to the government's interpretation. However, a contractor's objectively reasonable interpretation should not serve as the basis for fraud accusations and the imposition of punitive penalties and treble damages under the FCA.

interpretation may ultimately prevail. As a result, there invariably will be a factual dispute as to a defendant's knowledge that prevents a grant of summary judgment. *See* Pet. at 14 & n.10. Moreover, even without actual knowledge on the part of a defendant of the government's contrary interpretation, trial courts will deem granting summary judgment inappropriate because a factfinder "might conclude that [the defendant] acted with reckless disregard," which is sufficient knowledge for imposing liability under the FCA. *United States v. Newport News Shipbuilding, Inc.*, 276 F. Supp. 2d 539, 566 (E.D. Va. 2003); *see also* Pet. at 15-16 & n.11.

This petition raises the question and allows this Court to resolve the uncertainty as to which of these two different approaches should be used by the lower courts when faced with FCA allegations based on a reasonable interpretation of an ambiguous regulation or contract.

B. The Lower Courts Are Split On Whether A Civil FCA Lawsuit Can Be Based On A Reasonable Interpretation Of An Ambiguous Regulation Or Contract

Respondent contends that there is no split in the lower courts because all of the prior cases were decided based on whether a plaintiff offered evidence of a defendant's knowledge. Yet, what the lower courts have actually said belies this argument. As pointed out in the petition, there are numerous cases holding that "disputes as to interpretation of regulations do not implicate FCA liability." Pet. at 11-12 (quoting *United States ex rel. Swafford v. Borgess Med. Ctr.*, 24 Fed. Appx. 491, 491 (6th Cir. 2001)). These courts did not focus on the knowledge of the defendants. *See, e.g., United States ex rel. Lamers v.*

City of Green Bay, 168 F.3d 1013, 1018 (7th Cir. 1999) ("[I]mprecise statements or differences in interpretation growing out of a disputed legal question are similarly not *false* under the FCA.") (emphasis added). Although it is true that a line of lower court decisions considers a defendant's knowledge as determinative even where the alleged false claims involve a reasonable interpretation of an ambiguous regulation or contract, there plainly is no universally accepted standard or controlling test, and other courts have been unwilling to countenance FCA allegations based on disputes over ambiguous regulations or contracts.

In fact, the Eleventh Circuit's decision here does not even fit respondent's theory that a defendant's knowledge is controlling. Respondent contends that the key to the decision below was the Eleventh Circuit's purported conclusion that respondent had offered sufficient evidence of petitioner's wrongful knowledge. A careful reading of the decision, however, does not support respondent's analysis. The appeals court's opinion does not conduct a detailed examination of the deposition testimony or documents of petitioner's employees in order to determine petitioner's intent and state of mind. Rather, respondent submitted "provisions of the Medicare Carrier's Manual, Medicare bulletins, seminar programs, and expert testimony," and the circuit court carefully analyzed "whether any evidence outside the language of a Medicare regulation (including guidance issued by the governmental agency charged with administering the regulatory scheme) can be consulted to understand the meaning of that regulation." Pet. App. 12a-13a. This inquiry bears no relation to the knowledge of petitioner. Indeed, the court of appeals expressly stated that "[t]hus, they [the Manual, bulletins, seminar materials and experts] raise an issue of fact as to the *falsity* of [petitioner's] billing for nurse practitioner and physician assistant services

'incident to the service of a physician.'" *Id.* at 16a (emphasis added).

It also is noteworthy that respondent does not even attempt to reconcile the Eleventh Circuit's decision or her "knowledge" theory with the numerous criminal FCA cases cited in the petition. *See* Pet. at 16-21. As petitioner demonstrated, this Court has recognized that the civil and criminal FCA statutes historically grew up together and should be construed in a consistent fashion. Yet, in criminal FCA cases, "the government bears the burden to negate any reasonable interpretations that would make a defendant's statement factually correct where reporting requirements are ambiguous." *United States v. Migliaccio*, 34 F.3d 1517, 1525 (10th Cir. 1994); *see also* Pet. at 20 (and cases cited therein). As the *Migliaccio* standard indicates, these criminal FCA decisions do not look to a defendant's knowledge. Certiorari should be granted to resolve this conflict between the civil and criminal FCA cases on this important issue.

C. The Decision Below Is Contrary To The FCA And Violates Basic Constitutional And Common Law Principles

Respondent argues that petitioner's position "fl[ies] in the face of the remedial and preventative purposes of the FCA" and will "completely eviscerate any force or meaning of the FCA." Br. in Opp. at 1. This hyperbole is completely unsupported by any logic or case law.[3] Respondent does

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[3] Respondent states that petitioner's position is in "contravention of the words of the [FCA] statute." Br. in Opp. at 3. Yet, respondent never identifies what words those are. Congress nowhere specified in the FCA, nor does it appear in the legislative history, that claims based on ambiguous regulations fall within the statute's ambit.

not, and cannot, explain how a rule precluding FCA lawsuits based on a defendant's reasonable interpretation of an ambiguous regulation or contract is contrary to the language or purpose of the FCA. The FCA is aimed at frauds perpetrated by contractors against the United States. Submitting a claim that is a reasonable interpretation of an ambiguous regulation or contract may be "[taking] advantage of a disputed legal issue," *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1479 (9th Cir. 1996); it is not defrauding the United States. The submission of a claim based on a reasonable interpretation of an ambiguous regulation or contract cannot satisfy the falsity element under the FCA. A contractor also can never have the requisite wrongful intent when the claim submitted is reasonable and the regulation or contract ambiguous.[4] While a contractor's reasonable interpretation may ultimately be determined to be incorrect, thus resulting in the contractor owing money to the government, these actions do not rise to the level of a fraud that subjects a contractor to the FCA's draconian penalties and treble damages.[5]

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[4] Respondent creates a straw man by implying that petitioner is challenging the "knowingly" element of an FCA violation. Petitioner recognizes that this is an element under the Act and asserts that the wrongful knowledge requirement cannot be satisfied where the contractor submits a claim based on a reasonable interpretation of an ambiguous regulation or contract.

[5] Another wild charge by respondent is that petitioner advocates a "roadmap . . . to commit fraud . . . without the worry of liability if it can simply be said that the language of the applicable law, rule or regulation is ambiguous to someone in some context." Br. in Opp. at 1. This, of course, is a gross distortion of petitioner's position. FCA allegations are precluded only if the regulation or contract is ambiguous as specifically applied to a contractor's submission and only if a contractor's interpretation of the ambiguous regulation or contract is objectively reasonable. Additionally, in these circumstances, a contractor may nevertheless remain liable to the United States for contractual and

Respondent further argues that the Eleventh Circuit's decision ought to be affirmed because it furthers "the purpose of the FCA -- to provide a significant deterrence incentive for entities to not commit fraud against the United States government." Br. in Opp. at 1-2. But the threat of punitive FCA liability based on an objectively reasonable interpretation of an ambiguous regulation or contract only serves to chill contractors from engaging in legitimate disputes over regulatory and contractual meaning.[6] The United States should not receive a windfall, and a contractor should not be punished, because a regulation or contract is ambiguous. The United States has the ability to promulgate clear regulations and to draft clear contracts, and it has multiple administrative and contractual means to clarify vague provisions. Petitioner's approach would simply provide incentive for the government to write clear regulations and contracts and would create disincentives for the government and opportunistic *qui tam* relators seeking to use ambiguous regulations or contracts as the basis for filing strike suits and extracting settlements under the FCA.

Tellingly, respondent does not challenge the petitioner's description of the principles of fair warning under the Due Process Clause, the rule of lenity, and *contra proferentem*. Respondent concedes that these principles apply in the civil context where punitive sanctions, such as those imposed by the FCA, are at issue. Instead, respondent repeats her mantra about the circuit court's supposed finding

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administrative claims if its interpretation is later determined to be incorrect.

[6] This Court has recognized that the civil FCA is "essentially punitive in nature." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000); *see also Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 120 (2003).

of a factual dispute about petitioner's knowledge, as if that were a talisman that wards off all other legal doctrines. Respondent ignores the Eleventh Circuit's clear holding that the "incident to" regulation was ambiguous. This ambiguity deprived petitioner of the fair warning required by due process and implicated the rule of lenity and the doctrine of *contra proferentem*. Where a contractor submits a claim that is a reasonable interpretation of an ambiguous regulation or contract, these constitutional and common law principles compel a ruling that the punitive FCA sanctions cannot be applied.

D. The Question Presented In This Case Is Far-Reaching And Of Exceptional Importance

Respondent cannot dispute the billions of dollars paid annually by the government to private contractors or that government contracts permeate virtually every industry in the American economy. Nor can she dispute the proliferation of FCA lawsuits brought by the United States and *qui tam* relators and the huge sums involved in these actions. The exceedingly complicated nature of the regulations and contracts governing most government contracts, such as the Federal Acquisition Regulation or Medicare regulations, also cannot be gainsaid. The confluence of these factors makes this petition involving FCA allegations based on ambiguous regulations or contracts of exceptional and ever-growing importance.

Respondent argues that this petition is not significant because it involves simply a "routine finding on a summary judgment issue." Yet, as discussed above, *supra* section A, the outcomes are dramatically different depending on how the question presented in the petition is decided. The practical impact of a ruling that allows plaintiffs to survive a motion to

dismiss in these cases involving ambiguous regulations and contracts cannot be overstated. Obtaining summary judgment on the issue of knowledge is exceedingly difficult, if not impossible. Faced with the cost and unpredictability of a jury trial and potentially devastating penalties and treble damages under the FCA, defendants invariably are forced into paying substantial settlements rather than gamble with going to trial. Such extortionate settlements in instances where a contractor submitted a claim based on an objectively reasonable interpretation of an ambiguous regulation or contract are unfair and poor public policy.

As noted by *amicus* Pharmaceutical Research and Manufacturers of America -- whose members must navigate complex Medicare and Food and Drug Administration regulations and are frequent targets of the United States and *qui tam* relators -- the enormous pressure for settlement makes the issue presented in this petition of a type that is capable of repetition but evading review. The question of the implications of ambiguous regulations and contracts for FCA liability is squarely presented by this petition. This Court should grant review to resolve the confusion in the lower courts and to make clear that a reasonable interpretation of an ambiguous statute or regulation cannot give rise to liability for fraud under the FCA.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

MICHAEL L. WALDMAN
Counsel of Record
ALYSSA C. LAREAU
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
1001 Pennsylvania Avenue, NW
Suite 800
Washington, D.C. 20004-2505
(202) 639-7000

MICHAEL J. BITTMAN
GRAYROBINSON, P.A.
301 E. Pine Street
Suite 1400
Orlando, FL 32801
(407) 843-8880

Counsel for the Petitioner

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